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No. 77-309

In the Supreme Court of the United States

OCTOBER TERM, 1977

MCDONNELL DOUGLAS CORPORATION, PETITIONER

v.

PHILLIP W. HOUGHTON AND RAY MARSHALL, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE SECRETARY OF LABOR IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals, as amended (Pet. App. A-21 to A-26, A-28 to A-29), is reported at 553 F. 2d 561. The opinion of the district court (Pet. App. A-1 to A-20) is reported at 413 F. Supp. 1230.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 1977 (Pet. App. A-27), and a petition for rehearing was denied on June 1, 1977, at which time an order was entered revising two paragraphs of the

court's opinion (Pet. App. A–28 to A–30). The petition for a writ of certiorari was filed on August 24, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals correctly held that the record did not support petitioner's claim that age was a bona fide occupational qualification which justified its removal of a production test pilot from flight status at age 52.

STATUTE INVOLVED

Section 4 of the Age Discrimination in Employment Act of 1967, 81 Stat. 603, 29 U.S.C. 623, in pertinent part, provides:

> (a) It shall be unlawful for an employer—
> (1) to fail to refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; * * *
>
> * * * * *
>
> (f) It shall not be unlawful for an employer * * *—
> (1) to take any action otherwise prohibited * * * where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;
>
> * * * * *
>
> (3) to discharge or otherwise discipline an individual for good cause.

STATEMENT

Respondent Phillip Houghton was Chief Production Test Pilot for petitioner. He was removed from flight status at age 52 and discharged one year later after refusing to accept another position with petitioner. Houghton brought suit in the United States District Court for the Eastern District of Missouri to enjoin petitioner from violating the Age Discrimination in Employment Act of 1967, 81 Stat. 602, 29 U.S.C. 621 *et seq.* (hereinafter the "Act"), and to obtain reinstatement and monetary relief. The Secretary of Labor intervened as a party plaintiff, requesting injunctive relief. Petitioner, although admitting that it removed Houghton from flight status because of his age, denied any violation of the Act, claiming that its action was justified by the "bona fide occupational qualification" exception contained in Section 4(f)(1) of the Act, 29 U.S.C. 623(f)(1), and that its subsequent termination of Houghton was "for good cause" and thus within the exception provided by Section 4(f)(3) of the Act.

The district court sustained both of these defenses. The court of appeals reversed, holding that there was no evidence to support petitioner's "bona fide occu-

pational qualification" ("BFOQ") defense (Pet. App. A–22, A–25) and that the "motivating cause" for Houghton's termination "was his insistence upon his statutory rights" (Pet. App. A–26).

1. Petitioner manufactures high performance military aircraft for the United States and other countries (Pet. App. A–2, Fdg. 4; A. 601[1]). It employs approximately 15 test pilots, who are classified as production test pilots, engineering test pilots and experimental test pilots (Pet. App. A–3, Fdg. 9; A. 1469). These pilots are closely monitored, *e.g.*, they are examined twice yearly by petitioner's doctor who is a specialist in aerospace medicine (Dep. of Dr. Womack, pp. 5, 9, 11, 13–14), and they are given two flight checks annually by an Air Force-approved flight supervisor who flies with the pilot and checks his handling of the aircraft and of simulated flight emergencies (A. 1121–1122, 1365–1368, 1412–1413, 1434, 1455–1456, 1517–1520). The pilots also participate in a debriefing immediately after each flight, at which time they are observed and questioned extensively (A. 46, 59–60, 163–164, 1472, 1573).[2]

Respondent Houghton was first employed by petitioner in 1946 and worked as a test pilot and chief production test pilot from 1951 to December 1971 (A. 33–37, 44–45, 52–56, 79–81). According to petitioner's

[1] "A." and "Dep." refer to the appendix and depositions, respectively, filed in the court of appeals, a copy of which has been lodged with the Clerk of this Court. "Fdg." refers to the district court's Findings of Fact (Pet. App. A–2 to A–13).

[2] A production test flight usually takes an hour and 15 minutes (A. 64–65) and each pilot averages 13 flights per month (Plaintiff's Exh. 92).

own doctor, Houghton was in good health and was medically qualified to fly high performance aircraft at the time of his removal from flight status (Dep. of Womack, pp. 5, 13–14). He was a highly skilled pilot (A. 637, 645). Indeed, petitioner's other test pilots, who had flown with Houghton on numerous occasions, uniformly testified that he was an outstanding production test pilot, that there had not been any decrease in his proficiency or capability and that any such decrease would have been apparent from the manner in which he performed such difficult tasks as in-flight fueling, maintaining air speed, making appoaches and operating under instruments—all of which Houghton did extremely well (A. 1407–1408, 1436, 1457; Dep. of Behm, pp. 23–24; Dep. of Garrison, p. 27; Dep. of Dobronski, p. 183).

Petitioner, although asserting its "intuitive" judgment that older pilots represent a greater safety risk and should be removed before that risk becomes unacceptable (A. 648; see also 614–615, 623, 629–630, 645–647), admitted that it removed Houghton when it did because it was forced to reduce its staff of test pilots (A. 629–631). In addition to Houghton, who was 52, petitioner also removed the next two oldest pilots, who were 48 and 46 years old (A. 70–73, 77–78, 80–81, 84, 232, 234, 630, 1469).

Petitioner's judgment that experienced test pilots become a safety risk at about age 50[3] was not based on any objective study or standard industry practice; nor was it predicated on any discussion with peti-

[3] At the time of trial, petitioner had two 47-year-old test pilots on its staff (A. 403–404).

tioner's own medical specialist or with any other expert in the field of aerospace medicine or medicine generally (A. 646–647, 650; Dep. of Womack, p. 26).[4] Significantly, Air Force regulations do not specify age as a factor in qualifying pilots for these aircraft (A. 663–664, 666–669, 674).[5] There was also testimony that pilots in their 50's were permitted to fly high performance aircraft in the armed services and with NASA (A. 978–980, 988–989, 1086–1087, 1355–1356). At the time of trial there were 178 Air Force pilots age 50 or older flying single-piloted military aircraft (A. 1033–1036, 1044–1050).

The only evidence offered by petitioner in support of its BFOQ defense was the testimony of Dr. Alexander Lind and Dr. Thomas Frawley. While neither of these doctors had any experience in aerospace medicine (A. 343, 513, 519, 521, 540–541), both testified that in their opinion age is a bona fide occupational qualification for production test pilots (A. 481–487, 491–492, 496, 498, 539, 292–295, 300, 306, 308). These opinions, however, were based on the physiological and psychological changes which accompany the aging process in the general population (A. 268–271 274, 278, 282, 284–285, 294, 488–490, 495), and not

[4] Insofar as the record shows, the sole basis for petitioner's action, other than its need to reduce staff, was the experience of its vice president that he became more fatigued when flying as he got older (A. 616). While petitioner correctly states that its vice president grounded himself at age 44 (Pet. 4, n. 1), he testified that he did so because of the demands of his job and not because of age (A. 598, 606–607).

[5] The Air Force owns the planes manufactured by petitioner and its Chief of Flight Operations at petitioner's plant must approve each pilot before he may test fly an airplane (A. 663–664, 668).

on any specific data concerning professional pilots.

In response to this general medical testimony, the respondents called three doctors who were specialists in the field of aerospace medicine, had observed and studied pilots both in the laboratory and under flight conditions, and were familiar with the duties and demands of their jobs (A. 701–709, 722–724, 1308, 1310, 1062–1063, 1065, 1088–1089): Dr. Robert Proper, a specialist in gerontology, internal and aerospace medicine (A. 703–705, 707); Dr. Stanley Mohler, Chief of the Aeromedical Application Division at FAA's Office of Aviation Medicine (A. 1055, 1058–1061); and Dr. Charles A. Berry, formerly Chief of Flight Medicine for the U.S. Air Force and now president of the University of Texas Health Science Center and Chief of Flight Medicine for the NASA Spacecraft Center, where he is responsible for selecting and certifying the medical fitness of astronauts (A. 1305–1309; Plaintiff's Exh. 89). According to their testimony, which was specifically directed to the pilot population, the physiological and psychological changes described by petitioner's two experts occur much more slowly and to a lesser degree in professional aviators than in the population generally, and, as a result, the physiological and psychological differences between pilots in their 20's and 60's do not, absent some disease, impair the ability of the older pilots.[6]

[6] Dr. Proper was the chief investigator in an 11-year study of 503 professional aviators, 63 of whom were test pilots (A. 718–721). This study showed that pilots did not experience the physical changes that Dr. Lind assumed would plague older pilots, based on his knowledge of the general population. There was, for example,

All three specialists testified that age was not a bona fide occupational qualification, that many pilots can and do perform competently and safely in their 50's and 60's and that there is no objective basis for concluding that production test pilots over age 50, medically qualified and performing well, are less able than younger pilots to meet the physiological and psychological demands of their job (A. 840–842, 1170–1171, 1194, 1196, 1324–1327, 890, 924).

This medical testimony is confirmed by statistical data showing that although the accident rate of student and private pilots (who have general population characteristics) increases with age (see Pet. 7), the accident rate of professional aviators *decreases* and is less for the 45–59 and 60–74 year-old age groups than it is for the 16–29 and 30–44 year-old age groups (A. 375, 1499–1505). The Director of Aerospace Safety for the Air Force confirmed that older pilots have a better safety record (A. 992–993). Petitioner has had nine test pilot fatalities; all of the pilots have been under age 40 (A. 1383–1384).

Petitioner's other basis for advocating an age limit is that the possibility of heart attacks and strokes increases with age (A. 296–298, 302, 1575).[7] Heart attacks and strokes, however, are not caused by age itself but are the result of a disease process (A. 1113–1114) and, as petitioner's experts both acknowledged, the presence or absence of identifiable risk factors is a better indicator of possible heart problems than age (A. 356; see also Dr. Mohler, A. 1111). Drs. Mohler, Proper and Berry testified that the presence of these risk factors and the probability of a heart attack or stroke can be determined with a high degree of accuracy through the use of certain available and relatively inexpensive medical tests (A. 836, 839–840, 871, 874, 897, 901, 1083–1085, 1201, 1330, 1345, 1353). These witnesses also stated that the medical and performance tests currently in existence—and not age—provide the only reliable basis, when dealing with a small population of pilots, for identifying potentially unsafe pilots. Moreover, less than one percent of all aircraft accidents are caused by medical factors (A. 1117, 1156) and, of these, only a very small percent is caused by heart attack or stroke (A. 1128). It was undisputed that the major cause of accidents is pilot error and that older pilots are likely to have more experience and better judgment (A. 992–993).

On the basis of this record, the district court found that the "risk of sudden incapacitation * * * increases with age, but cannot be predicted with any accuracy"; that petitioner "had reasonable cause, in light of the expert testimony adduced at trial by all parties, to

almost no change in reaction time, circulation, stroke volume, blood pressure at rest, cardiovascular functions, work capacity or grip strength for older pilots, although there was a substantial change in the general population (A. 726, 728–729, 743, 749, 774, 776, 789, 796–798).

[7] Although petitioner states that "the risk of sudden incapacitation also increases with age" (Pet. 6), the evidence was undisputed that the only increase was in heart attacks and strokes and that other kinds of incapacitation—including gastroenteritis, which is the most common cause of incapacitation during flight—do not increase with age (A. 820, 1104, 1349).

believe that [respondent] Houghton, at age 52, would not be able to perform safely and efficiently the duties of a production test pilot"; and that "age is a bona fide occupational qualification for the job of production test pilot" (Pet. App. A–12 to A–13, Fdg. 49, 54, 55).

The court of appeals reversed, holding that these findings were "clearly erroneous" (Pet. App. A–25). In reaching this result, the court stated (Pet. App. A–28 to A–29):

> While the [respondents'] expert medical testimony agreed with that of the [petitioner] as to the general population, it went on to show that the aging process occurs more slowly and to a lesser degree among professional pilots. The evidence was, in our judgment, insufficient to support an inference of diminished ability among pilots of the age of Houghton to adequately perform their work.

The court also noted that the "safety record of the older pilots, within the sample studied, is better than that of the younger ones" (Pet. App. A–29).

ARGUMENT

1. It is undisputed that Houghton was not removed from flight duties simply because he was considered too old to perform those duties; he was removed because economic conditions forced petitioner to cut back its staff pilots and it chose to lay off Houghton because he was the oldest pilot on duty (Pet. App. A–7 to A–8, Fdg. 27, 30–33).[8] There was no evidence

[8] The other two pilots removed from flight status were the next two oldest pilots on duty. See page 5, *supra*. While a vice-president

that Houghton's performance as a pilot had deteriorated prior to his removal from flight status—or even that he would have been removed from flight duty in the absence of the cutback. Petitioner's action is precisely the type of discrimination that the Act forbids. See Section 4(a)(1), 29 U.S.C. 623(a)(1).

2. Contrary to petitioner's assertion (Pet. 12–14), the court of appeals in ruling on petitioner's BFOQ defense did not depart from the principles enunciated in *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F. 2d 224, 236 (C.A. 5), and *Hodgson* v. *Greyhound Lines, Inc.*, 499 F. 2d 859, 863 (C.A. 7).[9] It simply determined, on the basis of the record before it, that petitioner had failed to meet the burden of proof established by these decisions.

Under these decisions, an employer, in order to sustain a BFOQ defense, must demonstrate that the employment of older workers represents an increased safety risk (*Hodgson* v. *Greyhound Lines, Inc., supra,* 499 F. 2d at 863; *Usery* v. *Tamiami Trail Tours, Inc., supra,* 531 F. 2d at 236) or that the safety endangering characteristics of older workers cannot practically be ascertained (*Tamiami Trail Tours, supra*). The

of petitioner testified that he had discussed with Houghton over several years the fact that Houghton "couldn't fly forever" (A. 609), he testified that the staff reduction "was the final thing that convinced me" to remove Houghton (A. 608, 629).

[9] *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307, is not in point. The issue in that case was not whether the employer had established that age was a bona fide occupational requirement for certain police work, but whether the state could, under the rational basis test of the Fourteenth Amendment, set arbitrary age limits for retirement.

court below applied this standard (Pet. App. A–24 to A–25):

> This burden includes a showing that the Company has a factual basis for believing that substantially all of the older pilots are unable to perform the duties of test pilot safely and efficiently or that some older pilots possess traits precluding safe and efficient job performance unascertainable other than through knowledge of the pilot's age.

Here, the testimonial and statistical data, unlike that in *Greyhound* and *Tamiami,* showed that, among professional pilots, the older pilots have a *lower* accident rate than the younger pilots. The data also showed, unlike *Greyhound* and *Tamiami,* that the psychological and physiological changes which occur as part of the aging process occur in pilots more slowly than in the general population and do not occur in a sufficient degree to affect adversely the performance or productivity of test pilots and other professional aviators of petitioner's age.

The district court's contrary conclusion was based on "clearly erroneous" findings (Pet. App. A–25) which, the court of appeals held, disregarded "th[e] mountain of evidence against the [petitioner's] position" (Pet. App. A–24). This essentially factual holding does not warrant this Court's review.

3. Petitioner's contention (Pet. 16–17) that the decision below will encourage malingering is premature. The court of appeals, remanding the case, expressed

no view of the petitioner's allegations relating to mitigation, stating only that Houghton should be "awarded such damages as he has suffered by reason of his discharge" and that the district court, "[i]n calculating damages, * * * should appropriately consider the substantially lesser salary Houghton would have earned in the position offered him by the [petitioner]" (Pet. App. A–26). This statement clearly contemplates that the district court will consider evidence regarding mitigation. Any evidence in support of petitioner's charges of malingering may be presented to the district court on remand.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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